Justice, Misgendered: Constructing Gender/Equality in American Law

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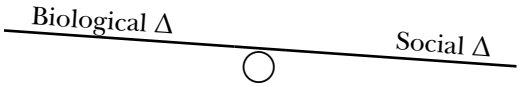
My overall project: I offer an account of the metaphysics, epistemology, and law of gender that begins with trans people's lived experiences on our own terms (*radical trans feminism*) rather than retrofits trans lives awkwardly into cis-centric theories, frameworks, and institutions (*trans-inclusive feminism*).[1]

Aim of this talk: I diagnose the failure of the metaphysics of gender/equality assumed by American constitutional law, focusing on the line of cases leading up to *United States v. Skrmetti*, No. 23-477 (U.S. argued Dec. 4, 2024) and *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 236 (2022).

I. The Dominant American Legal Metaphysics of Gender/Equality



The sameness–difference conception: Gender equality = lack of sex discrimination = lack of differential treatment unjustified by real underlying sex differences.

> "The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality." Rostker v. Goldberg, 453 U.S. 57, 79 (1981).
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> "Indeed, especially in light of the number of Americans who take short sojourns abroad, . . . there is no assurance that the father and his biological child will ever meet. . . . Section 1409 takes the unremarkable step of ensuring that such an opportunity, inherent in the event of birth as to the mother-child relationship, exists between father and child before citizenship is conferred upon the latter." Nguyen v. Immigration and Naturalization Service, 533 U.S. 53, 66–67 (2001).

My claim: Trans discrimination cases highlight an overlooked (if not dismissed) problem, which I call the *neutral application loophole*; it is *not* a misapplication of the sameness–difference conception!

a) *Equal application loophole*: Trans discrimination can be explained away by way of an alternative, facially-neutral underlying difference claimed to be shared by both cis and trans people.

> "The laws regulate sex-transition treatments for all minors, regardless of sex. Under each law, no minor may receive puberty blockers or hormones or surgery in order to transition from one sex to another." L.W. v. Skrmetti, 83 F.4th 460, 480 (6th Cir. 2023), *cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

b) *Unique application loophole*: Trans discrimination can be explained away by way of an alternative, facially-neutral underlying difference claimed to be unique but not universal to trans persons.

> "The [disability insurance] program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974).
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> The first Trump administration's trans military ban did not discriminate based on transgender status because "not all transgender persons seek to transition to their preferred gender or have gender dysphoria." Doe 2 v. Shanahan, 755 F. App'x. 19, 24 (D.C. Cir. 2019).

1. Ding, "Pregnant Persons as a Gender Category: A Trans Feminist Analysis of Pregnancy Discrimination," *Signs: Journal of Women in Culture and Society* 50, no. 3 (Spring 2025): 733–57.

My worry: The two sides of the neutral application loophole foreclose every conceivable way in which a claim of trans discrimination may be raised under the dominant conceptual framework of U.S. gender equality law. Consider the ban on gender-affirming care for trans youth upheld by *Eknes-Tucker v. Governor of the State of Alabama*, 80 F.4th 1205 (11th Cir. 2023), *petition for cert. filed sub nom. Eknes-Tucker v. Marshall*, No. 24-612 (U.S. Nov. 26, 2024).

> No discrimination based on sex: "the law . . . equally restricts the use of puberty blockers and cross-sex hormone treatment for minors of both sexes."
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> No discrimination based on "transgender status, separate from sex": "the regulation of a course of treatment that, by the nature of things, only transgender individuals would want to undergo" cannot treat trans youth differently from their similarly situated cis peers, as no such cis peers exist.
>
> No discrimination based on "gender nonconformity," separate from both sex and transgender status.

II. Two Attempts at Rescue

Bostock v. Clayton County, 590 U.S. 644 (2020): Discrimination based on transgender status is discrimination based on sex because, if a trans person had been assigned a different sex at birth, they would not have been treated differently from a similarly situated cis person.

> On a counterfactual analysis, discrimination against trans women is discrimination against persons assigned *male* at birth ("biological males").

Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004), extending *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989): Discrimination based on transgender status is discrimination based on sex stereotypes, which is in turn discrimination based on sex.

> Writing of a trans woman: "the discrimination he [*sic*] experienced was based on his [*sic*] failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance"; on a stereotyping analysis, discrimination against trans women is discrimination against "men [who] *do* wear dresses and makeup, or otherwise act femininely."

My worry: These two analyses complete a cis-centric—even if trans-inclusive!—account of (trans)gender equality. Whereas on the counterfactual analysis a trans woman is targeted for discrimination as a gender-nonconforming *male*, on the stereotyping analysis she is targeted as a *gender-nonconforming* male.

III. Bodily Autonomy vs. Gender Equality

> "We do not typically think that it is ethical to require psychological assessments prior to abortions, for instance, an intervention which bears some parallels to transition-related care. Both are frequently justified by reference to personal autonomy and are frequently but not always motivated by distress, and yet neither pregnancy nor being trans is illness." (Ashley 2019, 481–82)

My worry: Bodily autonomy arguments like Ashley's approach gender-affirming care as if it really is *just* like any other form of medical care.

> In an actual analogy to abortion, gender-affirming care is essential to gender equality in a way that most other forms of medical care are not; transition-related care vs. *gender*-affirming care.
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> In ungendering gender-affirming care, bodily autonomy arguments then gloss over substantive issues of power—the precarious social conditions for trans people's material survival and flourishing on equal terms, at the mercy of an overwhelmingly cisgender world nonetheless.
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> The metaphysics of gender plays a crucial role in explaining pervasive and persistent inequalities faced by trans people; an adequate theory of (trans)gender equality must take seriously *both* the gender (the metaphysics & epistemology) *and* the equality (the political & legal philosophy).